No. 11758

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF JOSEPH H. HEIDT,

Deceased,

LOUISE SEELEY, Executive,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR PETITIONER.

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Summary.

Property held in joint tenancy on October 21, 1942, is not affected by Internal Revenue Code, Section 811(e)(2). The amendment is prospective not retrospective as no retrospective application was set forth in the Statute or elsewhere indicated. Petitioner, if her interpretation of Internal Revenue Code, Section 811(e)(1) is correct, need not also prove the contributions of petitioner to the community funds from compensation for her personal

services. Decedent did not deal in real estate, but the items were purchased by Petitioner or by decedent and Petitioner together, each contributing funds to such purchase. Furthermore Petitioner was highly successful in the real estate business while decedent failed three times, though he never went into bankruptcy and did manage to pay all the family living expenses. Thus petitioner has shown the required contribution to the community, if Internal Revenue Code, Section 811(e)(1) is interpreted to require such showing.

ARGUMENT.

POINT I.

No Reason Appears Why Joint Tenancy Property Should Be Affected by the Amendment of the Law Relative to Community Property.

If at the time that the amendment to Internal Revenue Code Section 811(e) was passed property was held in joint tenancy, an amendment applying to community property would not affect it. As has been pointed out in Petitioner's Opening Brief (Ptr. Br. pp. 17 and 23) in California the law is that in the case of property held in joint tenancy, the interests of each tenant are separate property, not community. If then, such property had been purchased with community funds the effect of such transaction must be measured by the law applicable at that time which recognized the "present existing and equal" interests of both spouses in community property. It is unquestioned that before Section 811(e)(2) was added to

the Internal Revenue Code that the use of community funds to purchase joint tenancy property established the equal contributions of the spouses to it.

Here Respondent is attempting to show that Section 811(e)(2) reaches back retroactively and fastens on property that had lost its character as community property long before. How a law relating to community property could affect property that had not been community property for several years is not apparent. Respondents only hope of showing the applicability of Section 811(e)(2) to matter beyond its scope is to treat the section as if it read that it was to apply to community property *and* to all property that ever had been community property. The fallacy of this is apparent if one considers what the effect would be if this doctrine were used in a situation where community funds were used to buy property, title to which was taken in tenancy in common. Is the whole of such property to be taxed to the decedent tenant on the death of one of the tenants? Patently not. The tax situation is determined at the time of death and how such property is to be taxed is determined by rules governing such property. If the law requires that the source of property be traced, it is done in the light of the law applicable to that kind of property, not in the light of other rules concerning another type of tenancy. Particularly is this so when the rules as here were not in existence during any of the time that the property was community property.

POINT II.

If Community Property Transferred Before October 21, 1942, Must Meet the Tests of a Later Statute Then the Transfer Is Taken as the Taxable Event and the Retroactive Application of the Statute Should Have Been Clearly Directed by Congress.

Respondent has spent considerable time asserting the proposition that unless Sections 811(e)(1) and 811(e)(2) of the Internal Revenue Code are interpreted in accordance with Treasury Regulations 105, Section 81.22 (as amended by T. D. 5239, 1943 Cum. Bull. 1081) opportunity will be afforded for tax avoidance. Whatever merit this argument might have to transfers on October 21, 1942, or thereafter, or more specifically, to transfers on or after March 10, 1943, the date of Cumulative Bulletin containing T. D. 5239 shall argument lose any force it might have when applied to joint tenancy property acquired before October 21, 1942.

No one made a transfer of community property into joint tenancy before 1942 to achieve such a result. It must be remembered that no foreseeable tax advantages could have accrued at the time the transfers were made, as Community Property was taxed one-half to the decedent spouse just as in the case of property held in joint tenancy.

Therefore any purpose imputed to Congress that Congress was trying to reach such transactions retroactively, to correct an avoidance taking place before the 1942 Revenue Act was passed should have been indicated clearly.

Otherwise the normal prospective application must be given. This is most consistent with the interpretation that the Revenue Act of 1942 and T. D. 5239 of March 10, 1943, were designed to prevent the shifting of Community Property to joint tenancy as a result of the passage of the act. Whether such measures were effective or not is beside the point here, as we are dealing with property that lost its Community character long prior to 1942.

POINT III.

Petitioner Need Not Meet Both the Burden of Pointing Out the Incorrectness of Section 81.22 of Treasury Regulations 105, as Amended, and of Proving the Contribution of the Survivor by Means of Personal Services to Half of the Community.

Respondent asserts that Petitioner must meet the requirements of Section 81.22 of Treasury Regulations 105, as amended even though she has shown such regulation to be erroneous. The very reverse is the case, for if Petitioner's interpretation of Internal Revenue Code, Section 811(e)(1) is correct, the task of Petitioner is at an end and further inquiry is of no purpose whatever. Only if the validity of this regulation is upheld is it necessary to inquire further and to determine if the situation meets the requirements of Section 81.22. The dissenters in the Tax Court, as has been pointed out, thought such burden had been met by Petitioner in the case of items one, three, and six. Petitioner has pointed out in her Opening Brief how such burden has also been met for the other items.

POINT IV.

The Items of Real Estate Were Not Purchased by Decedent as Asserted by Respondent but Were in Some Cases Purchased Jointly and in Others by Petitioner.

Respondent asserts that the evidence and findings of the Tax Court show that items one, two, three, four and five were all purchased by decedent. (Resp. Br. p. 23.) Respondent attempts to show thereby that Petitioner made no contribution thereto. In the first place, the inferences attempted to be drawn are purely in the realm of speculation, and, secondly, this is not the case. Item one was in truth and fact purchased by Petitioner, her funds as soon as made available going to make up the down payment. [Record p. 19.] Then, as to item two, the Tax Court indicated that the purchase, though nominally made by decedent, was made from funds of both spouses. [Record p. 19.] Again in the case of item three the court sets forth that decedent bought one house and Petitioner the other. [Record p. 20.] Item four was bought by Petitioner [Record p. 53] although the Tax Court found that decedent acquired it. Such finding was erroneous in view of the uncontradicted testimony of Petitioner. Item five, the note and trust deed, covered a hotel built by Petitioner [Record pp. 46-47] and rented immediately thereafter to a Japanese. Later it was sold to the Japanese and a note and trust deed taken. [Record pp. 63-64.] Decedent merely handled the sale and the execution of the trust deed.

POINT V.

Where the Personal Services of the Wife Gave Rise to the Community Property It Is Not Necessary to Inquire as to Whether It Is "New Type" or "Old Type" Community Property as Petitioner Asserts in Pages 24 to 27 Inclusive of Respondent's Brief.

When, as here, the wife engaged in one business, that of buying, selling, trading, renting and managing real property, and the husband engaged in the sometimes highly profitable, sometimes disastrous, calling of commission merchant and wholesaler of produce, Petitioner has shown her monetary contribution to the family exchequer by showing such business enterprise and inquiry as to the type of community property is irrelevant. Here Petitioner maintained a revolving fund in which the proceeds of her efforts in the real estate field were deposited and which was used for new ventures. The only one interested in whether such property was "new type" or "old type" was decedent, who lost certain powers over one-half community property in 1927. Basically his rights were not changed as they would not ripen-free of restrictions until the dissolution of the community by death or divorce. The interest of the wife "while it has not yet reached the status of a vested interest" is "a much more definite and present interest than that of an ordinary heir." (*Stewart v. Stewart* (1926), 199 Cal. 318, 249 Pac. 197.) But even if decedent did have greater rights before 1927 than thereafter he must be deemed to have waived them for the reason that he allowed petitioner to commingle "old" and "new" types of community property in the same

revolving fund. Whatever greater rights the husband had in "old type" property that could not be abridged (see *Trimble v. Trimble* (1933), 219 Cal. 340, 346, 26 P. (2d) 477), such rights could be waived as was done here.

Furthermore, it must be pointed out that Petitioner was highly successful in the real estate business while decedent failed three times. Though decedent never went into bankruptcy, he had to pay large debts. In addition he paid all of their living expenses. Thus it is logical to assume that what remained after eight years of retirement was merely his share of the money on deposit in the bank accounts. Petitioner continued in her real estate business after his retirement in a period of increasing activity and a rising market. Therefore it can be inferred that what property they had at decedent's death came largely from Petitioner's efforts.

Conclusion.

Therefore, it is submitted, that for the reasons set forth in Petitioner's Opening Brief and in the foregoing, the decision of the Honorable Tax Court below is erroneous and should be reversed.

Respectfully submitted,

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